Supreme Court, U.S.
FILED

98 13 JUN 2 1998

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No.___

In The
Supreme Court of the United States
October Term, 1997

EMILY J. WAGNER,

Petitioner,

v.

TRW INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

The questions presented in this petition arise from a series of reactions by TRW INC. to Emily Wagner's continuing complaints regarding escalating inaccuracies in her credit report.

The questions presented are:

1. Whether TRW's procedure of reporting late payment history as "6 Or More" times late (instead of reporting, as in Wagner's case, "7" times late) conflicts with the Fair Credit Reporting Act's requirement that reported information contain "procedures to assure maximum possible accuracy" of the information reported?

2. Whether the Fair Credit Reporting Act's requirement that a credit bureau disclose to the consumer the source of its reported information (in this case Wagner's repeated requests for the

source of the "Bottlecap Lounge" employment entry and an extra 30-day late payment entry that suddenly appeared in her file during the course of the "6 Or More" dispute) may be nullified because of a procedural error made by the consumer's attorney?

TABLE OF CONTENTS

Questions presented for review.....-i-

Table of Contents.....-iii-

Table of Authorities.....-iv-

Opinions Below.....1

Jurisdiction.....2

Statutes Involved.....2

Statement of the Case.....4

Reasons for Granting the Writ.....8

I. The decision below conflicts with the decision of the U.S. Appeals D.C. in Koropolos v. Credit Bureau and the Fifth Circuit's own opinion in Pinner v. Schmidt, demonstrating the need for a clear explanation of the FCRA term "maximum possible accuracy" applicable to all the circuits.....8

II. The decision below to affirm summary judgment in spite of the pending "source disclosure" request is contradictory to Fed. Rules of Civil Procedure Rule 56(c) and is manifestly unfair to Wagner 10

Conclusion.....12

TABLE OF AUTHORITIES

Guimond v. Trans Union Credit Information Co,45 F.3d 1329 (9th Cir. 1995).....9,10

Koropolous v. Credit Bureau Inc, 734 F.2d 37,40,42 (D.C. 1984), 236 U.S. App.D.C. 136.....9

Pinner v. Schmidt, 805 F.2d 1258, 1263 (5th Cir. 1986).....8

Fair Credit Reporting Act (FCRA)
15 U.S.C. 1681e(b).....2,4,5
15 U.S.C. 1681g(a)(2).....3,6,7, 8,11
15 U.S.C. 1681n.....3,5

Federal Rules of Civil Procedure 56(c)...3,11

INDEX TO APPENDICES

APP A Decision of the Fifth Circuit

APP B Decision of the District Court

APP C Judgment of the District Court

APP D Dist Court Denial of Motion to Reconsider

In The
Supreme Court of the United States
October Term, 1997

EMILY J. WAGNER,

Petitioner,

v.

TRW INC.,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

Petitioner, Emily Wagner, petitions the Court for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The decision and judgment of the Fifth Circuit Court of Appeals of March 4, 1998 is not reported, but is reprinted in the Appendix to this Petition. The District Court's May 8, 1997

denial of a motion for rehearing is reprinted in the appendix. The District Court's Memorandum Ruling and Judgment of March 31,1997 is not reported, but is reprinted in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on March 4, 1998. This petition for certiorari is being filed within 90 days of that decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. para. 1254(1).

STATUTES INVOLVED

The Following references are to the Fair Credit Reporting Act (FCRA), 15 U.S.C. Section 1681 et seq.:

15 U.S.C. 1681e(b): "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the

information concerning the individual about whom the report relates."

15 U.S.C. 1681g(a)(2): "Every consumer reporting agency shall upon request...clearly and accurately disclose to the consumer...[t]he sources of the information."

15 U.S.C. 1681n: "Any consumer reporting agency ... which willfully fails to comply with any requirements imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court."

This petition also cites Fed. R. Civ. P. 56(c) (1997): "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories... show

that there is no genuine issue as to any material fact."

STATEMENT OF THE CASE

Emily Wagner sued TRW INC on October 19, 1995. In the suit she claimed that TRW's procedure of reporting her JC Penney credit history as "6 Or More" times late instead of "7" times late was willfully contrary to the "maximum possible accuracy" procedural requirements of 15 U.S.C. 1681e(b). She also claimed that TRW's deletion of her correct employment and its unexplained substitution by "Bottlecap Lounge" was a willful act designed to threaten her because she complained about the "6 Or More" procedure. She claimed that the insertion of an extra 30-day late payment notation into her JC Penney history was a willful act by TRW designed to harm her because she complained about the new "Bottlecap Lounge"

entry into her file. She claimed that TRW's procedure of willfully entering potentially misleading information and maliciously inaccurate information into a consumer's file is in violation of the 15 U.S.C. 1681e(b) requirement for procedures to assure "maximum possible accuracy" and TRW is thus liable for punitive damages under 15 U.S.C. 1681n. Wagner did not claim damages because a third party saw the "Bottlecap Lounge" entry; to the contrary, she claimed punitive damages because of TRW's willful act of entering the malicious and incorrect information into her file.

Wagner stated that she experienced considerable mental distress during the course of this outrageous sequence of events and she continues to fear what TRW may place in her file unbeknownst to her.

Inadvertently, Wagner's original complaint and her response to TRW's motion for summary judgment did not specifically plead a violation

of the source disclosure requirement of 15 USC 1681g(a)(2). However, plaintiff Wagner repeatedly asked TRW to disclose the source of "Bottlecap Lounge" and the extra 30-day late payment entries in her credit file. Finally, Wagner asked the court to grant a Motion In Limine to prohibit TRW from pleading ignorance regarding the source of the entries. Excerpts from plaintiff's Motion In Limine, originally presented to Judge Putnam's court on July 16, 1996 and re-urged before newly reassigned Judge Melancon on February 20,1997 are given here:

> "...[1681g(a)(2) is cited on page 2, and...] The language of S e c t i o n 1681g(a)(2) expressly states that every consumer reporting agency must upon the request of any consumer disclose the source of the information. To permit the Defendant to argue that the derogatory remarks ["Bottlecap Lounge" and extra 30-day late] were the result of a combined and/or mix merge problem or that the information on the Plaintiff's credit report were inputted into the TRW system by some unknown source would be to permit the Defendant a defense which the Act does not afford...The Defendant has continually maintained in depositions that they 'don't know' and 'cannot tell' who inputted this

> information, however that they can say it 'wasn't TRW'... The expressed language of 15 USC Section 1681g(a)(2) does not afford the Defendant the defense of ruling out group of individuals that did not provide the information."

Excerpts from TRW's response to the Motion in Limine show TRW continued to "plead ignorance":

> " 'Bottle Cap'...If TRW's records reflect that the information came from an unidentified subscriber, then TRW is entitled to present this explanation...If TRW's records show that an unknown source input information, then that explanation is relevant to rebut plaintiff's claim that TRW input the information."

Summary judgment was issued by the district court while this Motion in Limine was pending, and the issue of source disclosure was ignored in its opinion. The appeals court did comment on the source disclosure argument, noting that "Courts have previously rejected attempts by a credit agency to simply plead ignorance." However the appeals court stated that the issue could not be considered because "Although this issue was mentioned in the recitation of the facts in the complaint, the plaintiff did not

specifically plead a violation of Section 1681g(a)(2) in the complaint, nor did the plaintiff raise the issue in its response to TRW's motion for summary judgment."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE U.S. APPEALS D.C. IN KOROPOLOS V. CREDIT BUREAU AND THE FIFTH CIRCUIT'S OWN OPINION IN PINNER V. SCHMIDT, DEMONSTRATING THE NEED FOR A CLEAR EXPLANATION OF THE FCRA TERM "MAXIMUM POSSIBLE ACCURACY" APPLICABLE TO ALL THE CIRCUITS.

The Fifth Circuit, in its opinion for this case, cited its opinion given in Pinner: "The standard [to determine maximum possible accuracy] used by the court was 'what a reasonably prudent person would do under the circumstances.'" citing Pinner v. Schmidt, 805 F.2d 1258,1262 (5th Cir. 1986).

In Koropolous the court wrote:

> "[R]eports containing factually correct information that nonetheless mislead their readers are neither maximally accurate nor fair to the consumer who is the subject of the reports...[T]he court, in determining whether a violation of 1681e(b) has occurred, would weigh the potential that the information will create a misleading impression against the availability of more accurate (or complete) information and the burden of providing such information...[and thus]...we find that the district court's dismissal of the Koropolos' claims by summary judgment on the grounds that the information was technically accurate, regardlless of any confusion generated in the recipients' minds as to what is meant, was improper." Koropolos v. Credit Bureau Inc, 734 F. 2d 37,40,42 (D.C. 1984), 236 U.S. App. D.C. 136.

The Fifth Circuit's opinion in the present case is in conflict with these interpretations: "[T]he 'or more' notation, although imprecise, is neither inaccurate nor open to an interpretation that is directly contradictory to the true information."

The FCRA is to be liberally construed in favor of the consumer. Guimond vs Trans Union Credit Information Co 45 F.3rd 1329 (9th Cir.

1995). The Guimond case at page 1333 said:

> "The FCRA was the product of congressional concern over abuses in the credit reporting industry. The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner. These consumer oriented objectives support a liberal construction of the FCRA."

While JC Penney and TRW both may consider "6 Or More" to be correct because they know the actual number to be "7", how is an inquiror to know? The differing interpretations of "Maximum Possible Accuracy" need to be resolved, because the conflict is unfair to the consumer and contrary to the intent of the Fair Credit Reporting Act. For this reason, certiorari should be granted.

II.

THE DECISION BELOW TO AFFIRM SUMMARY JUDGMENT IN SPITE OF THE PENDING "SOURCE DISCLOSURE" REQUEST

IS DIRECTLY CONTRADICTORY TO FEDERAL RULES OF CIVIL PROCEDURE RULE 56(C) (1997) AND IS MANIFESTLY UNFAIR TO WAGNER.

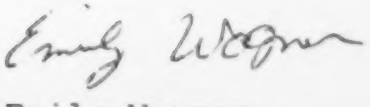
Both plaintiff Wagner's Motion in Limine, which specifically claimed a violation of FCRA 15 U.S.C. 1681g(a)(2), and TRW's response to this motion were awaiting an order from the district court when the court instead issued its summary judgment entirely ignoring the source disclosure issue. Since a "genuine issue as to any material fact" was pending before it, the district court's granting of summary judgment in effect assisted TRW's efforts to once again avoid Wagner's requests to be told the source of "Bottlecap Lounge" and the extra 30-day late entry that mysteriously entered into her file after she complained about another issue. This source issue concerns not only Wagner, but anyone else who has credit, whether in the form of credit cards, or a home or car loan; or carries insurance; or is seeking

employment.The "source" question demands an answer and the Court should grant certiorari.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,



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June 1, 1998

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APPENDIX

App A1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30601
Summary Calendar

EMILY J. WAGNER,
Plaintiff-Appellant,

versus

TRW, INC.,
Defendant-Appellee

Filed March 4, 1998

Appeal from the United States District Court
for the Western District of Louisiana
(95-CV-1865)

Before REAVLEY, KING and DAVIS, Circuit Judges.
PER CURIAM:*

Emily Wagner sued TRW, Inc. for violations of the Fair Credit Reporting Act (FCRA)[2] seeking actual damages, punitive damages, costs and attorneys fees. The trial court granted

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[2] 15 U.S.C. 1681 et seq. (1998).

summary judgment for TRW, Inc., and Wagner now appeals. We affirm.

In June 1994, Wagner requested a copy of her credit report from TRW after being turned down for credit. The credit report contained an entry which stated that Wagner had "5 or more" late payments on an account with JC Penney. Wagner complained about this entry. TRW sent a consumer dispute verification request (CDV) to JC Penney; the CDV indicated that Wagner had been late with payment "6 + times." JC Penney confirmed that the report was correct. Wagner complained again to TRW, another CDV was sent out, and JC Penney again confirmed the information. At this time, the employment line was changed from "psychological services" to "Bottlecap Lounge." Wagner complained, and the employment information was corrected.

Discussion

This Court reviews a district court's grant

of summary judgment de novo, applying the same standard as did the district court.[3] Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4]

The FCRA requires that "[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information conserning the individual about whom the report relates."[5] The FCRA is to be

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[3]Neff v. American Dairy Queen Corp., 58 F. 3d 1063,1065 (5th Cir. 1995).

[4]Fed. R. Civ. P. 56(c) (1997).

[5]15 U.S.C. 1681e(b) (1998).

liberally construed in favor of the consumer.[6]

> The legislative history of the FCRA reveals that it was crafted to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner.[7]

This Court has previously noted the distinction between "accurate information" and "maximum possible accuracy."[8] In Pinner v. Schmidt, this Court found that a notation of "Litigation Pending" was ambiguous, and could easily be construed to indicate that the plaintiff was being sued by the company, while the situation was actually the reverse.[9] The Court found that "[i]t would have been a simple matter to prevent this ambiguity," and that this

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[6]Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).

[7]Id. (citations omitted).

[8]Pinner v. Schmidt, 805 f.2d 1258,1262 (5th Cir. 1986).

[9]Id.

was sufficient to uphold a jury verdict in favor of the plaintiff.[10] The standard used by the Court was "what a reasonably prudent person would do under the circumstances."[11] Wagner argues that TRW's use of "or more" was unreasonably ambiguous because it could mean that she was late 6,10, or 100 times. However, in contrast with the entry at issue in Pinner, the "or more" notation, although imprecise, is neither inaccurate nor open to an interpretation that is directly contradictory to the true information.

Wagner also argues that TRW violated the FCRA by entering incorrect employment information. However, Wagner has presented no evidence that the erroneous information was ever disclosed to a third party. No case has extended FCRA damages to include pain and

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[10]Id. at 1262-63.

[11]Id. at 1263.

suffering damages based on information that a crdit reporting agency never provided to any third party.[12]

Wagner also claims that TRW violated the FCRA by not disclosing the source of this inaccurate employment information. The FCRA states that "[e}very consumer reporting agency shall, upon request [and proper identification of any consumer], clearly and accurately disclose to the consumer...[t]he sources of the

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[12]See Casella v. Equifax Credit Info. Servs., 56 F.3d 469, 474-75 (2d Cir. 1995) (holding that the plaintiff was not entitled to any damages for pain and suffering simply because plaintiff knew there was inaccurate information on plaintiff's credit report, because that information was not conveyed to any third party); Hyde v. Hibernia Nat. Bank, 861 F.2d 446, 449 (5th Cir. 1988) ("The statute does not allow suit against the credit agency for creating, possessing, or revealing to a consumer credit files containing erroneous information."). Cf. Stevenson v. TRW, Inc., 987 F.2d 288,297 (5th Cir. 1993) (allowing recovery where plaintiff was denied credit three times and experienced considerable embarrassment from having to discuss his problems with business associates and creditors).

information."[13] Courts have previously rejected attempts by a credit agency to simply plead ignorance.[14] Although this issue was mentioned in the recitation of the facts in the complaint, the plaintiff did not specifically plead a violation of 1681g(a)(2) in the complaint, nor did the plaintiff raise the issue in its response to TRW's motion for summary judgment. This Court will not consider arguments that were not presented to the district court.[15]

Because Wagner has not presented evidence of an actionable claim of actual damages, we do not reach the issue of punitive damages.

AFFIRMED.

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[13]15 U.S.C. 1681g(a)(2); Guimond vs Trans Union Credit Info Co., 45 F.3d 1329, 1334 (9th Cir. 1995).

[14]See Guimond, 45 F.3d at 1334.

[15]Williams v. Time Warner Operation, Inc., 98 F.3d 179, 183 (5th Cir. 1996).

 APP B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Emily J. Wagner Civil Action No 6:95-1865

versus Judge Tucker L Melancon

TRW Inc.

MEMORANDUM RULING AND JUDGMENT

Before the Court is a motion for summary judgment filed by the defendant. For the reasons that follow, the motion is granted.

Background

The plaintiff, Emily J. Wagner, has filed this action asserting that the defendant TRW Inc., a credit reporting agency, has negligenntly and/or willfully violated various sections of the Fair Credit Reporting Act (FCRA).

Wagner contacted TRW on June 16,1994 requesting a disclosure of her credit profile. TRW sent Wagner her credit report as requested. Upon receiving the report, Wagner believed that certain reported information, specifically in

regard to her JC Penny account, was inaccurate. The entry regarding Wagner's JC Penny account indicated that the account was thirty days past due and had been thirty days past due five or more times. Wagner contacted TRW and informed them that she believed the information about her JC Penny account was inaccurate and requested that the information be corrected. TRW conducted an investigation of Wagner's complaint which consisted of TRW contacting JC Penny and requesting that it verify the accuracy of the reported information. JC Penny responded by confirming that the information reported was accurate. TRW informed Wagner of the result of its investigation and sent an updated credit report.

On July 26, 1994 Wagner again requested that the information be investigated asserting that her JC Penny account was not delinquent and that the information was incorrect. The information on the updated report reflected that

the JC Penny account was presently current, but that the account had been past due thirty days on six or more times. TRW verified the information again with JC Penny which indicated that the reported information was accurate. TRW informed Wagner of the results of its investigation.

For a tjird time, on December 12,1994, Wagner again requested that the JC Penny account information be investigated because she believed the information to be incorrect. The information was again verified with JC Penny which indicated that the information was accurate. Wagner was notified of this result.

On the credit report provided to Wagner after the December 12,1994 investigation of the JC Penny account, Wagner noticed that her employment history was inaccurate. The report reflected that Wagner had been employed at a lounge which was incorrect. Wagner notified TRW of this inaccuracy on January 11, 1995, and TRW

immediately removed this information from Wagner's credit report.

Summary Judgment Standard

A motion for summary judgment shall be granted if the pleadings, depositions, and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed R.Civ.P.56. Once the movant produces such evidence, the burden shifts to the respondent to direct the attention of the court to evidence in the record sufficient to establish that there is a genuine issue of material fact requiring a trial. Celotex Corp v. Catrett, 477 U.S.317, 322-23(1986). The responding party may not rest on mere allegations made in the pleadings as a means of establishing a genuine issue worthy of trial.Anderson v. Liberty Lobby, Inc, 477U.s> 242,248-49(1986). If no issue of fact is presented and if the mover is entitled to

judgment as a matter of law, the court is required to render the judgment prayed for. Id. Before it can find that there are no genuine issues of material fact, however, the court must be satisfied that no reasonable trier of fact could have found for the non-moving party. Id.

Analysis

Wagner has filed suit against TRW alleging that TRW violated the following sections of the FCRA: section 1681(a) by failing to delete inaccurate information; section 1681i(a) by failing to investigate the sources suggested by her during the reinvestigation; section 1681g(a)(1) by failing to disclose the nature and substance of all information in its file at the time requested; section 1681e by failing to follow reasonable procedures to assure the maximum possible accuracy of the reported information; and section 1681h(c) by failing to provide trained personnel to explain the information in her file. TRW has filed a motion

for summary judgment asserting that Wagner's claim should be dismissed because the information about the JC Penny account was accurate, TRW immediately deleted the employment information as requested by the plaintiff, and Wagner cannot demonstarte that TRW acted willfully or negligently or that she sustained any damages.

Congress enacted the FCRA to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit in a manner both fair and equitable to the consumer. 15 U.S.C. 1681. The purpose of the FCRA is to protect an individual from an inaccurate or arbitrary information about herself in a consumer report. Pinner v. Schmidt, 805 F.2d 1258, 1261 (5th Cir. 1986). A consumer reporting agency that negligently fails to comply with the FCRA's requirement is liable for actual damages, costs, and reasonable attorney's fees. 15 U.S.C. 1681o. Willful

noncompliance renders a consumer reporting agency additionally liable for punitive damages. 15 U.S.C. 1681n. When a consumer reporting agency receives a complaint, it must reinvestigate the disputed information within a reasonable period of time and promptly delete credit information that has been found to be inaccurate or unverifiable. 15 U.S.C. 1681i(a). Here, Wagner challenged the accuracy of the account information. (R.28 Affidavit of Carla Blair, Exhibits A-G). Each time Wagner objected to the information, TRW verified the information and reported its results to Wagner. Id. While the repeated complaints about the JC Penny account information by Wagner demonstrate that she believed the information to be false and was frustrated by the continued reporting of the information, the undisputed evidence indicates that this information was in fact correct, and had been repeatedly verified as correct by JC Penny when inquired into by TRW. (R.28,

Affidavit of Nancy Jones, Exhibit H). Wagner has put forth no evidence to demonstrate that this information is inaccurate or that the assertions by JC Penny are erroneous.

As to the issue about the incorrect employment information, TRW deleted this information as soon as Wagner informed it that the information was wrong. (R.28, Exhibit I). TRW complied with the FCRA in handling this matter. 15 U.S.C. 1681i; see Stevenson vs TRW Inc, 987 F2d 288,292 (5th Cir. (1993).

The evidence indicates that TRW acted reasonably and expeditiously in handling Wagner's complaints. Wagner has put forth no evidence to demonstrate that TRW acted negligently in any aspect of handling Wagner's claims much less that TRW acted willfully. 15 U.S.C. 1681 et seq; Fed R. Civ. P.56(c). Furthermore, Wagner has put forth no evidence that any of TRW's actions or alleged violations of the FCRA has caused Wagner damages. While the

FCRA permits recovery for humiliation and mental distress even where no pecuniary or out-of-pocket loss has been shown, Wagner must demonstrate that she sustained actual damages. Fischl v. General Motors Acceptance Co., 708 F.2d 143,151 (5th Cir. 1983). Wagner has provided no competent summary judgment evidence to establish that she suffered actual damages. A party may not rely on mere allegations made in the pleadings as a means of establishing a claim or asserting that there is a genuine issue worthy of trial. Anderson, 477 U.S. at 248-49.

Accordingly, because there is no evidence that TRW acted contrary to the FCRA or acted negligently or intentionally in handling Wagner's credit information, and because Wagner has failed to put forth competent summary judgment evidence to establish a material issue of disputed fact about her claims or that she suffered any damages, Wagner's claims will be dismissed.

 APP C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISAION

Emily J. Wagner	Civil Action No.6:95-1865
versus	Judge Tucker L. Melancon
TRW Inc.	Magistrate Judge Mildred E. Methvin

JUDGMENT

In accordance with the Memorandum Ruling issued on this date, **IT IS ORDERED** that the Motion for Summary Judgment, filed by the defendant, is granted, and that the plaintiff's claims are dismissed with prejudice.

This done and signed this 31st day of March, 1997 at Lafayette, Louisiana.

s/_____
Tucker L Melancon
United States District Judge

Judgment entered April 3, 1997.

APP D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Emily J. Wagner — Civil Action No.6:95-1865

versus — Judge Tucker L Melancon

TRW, Inc.

ORDER

IT IS ORDERED that Plaintiff's Motion to Reconsider Memorandum Ruling and Judgment and/or Motion for a New Trial is **DENIED**.

Thus done and signed this 8th day of May, 1997 at Lafayette, Louisiana.

s/_____
Tucker L Melancon
United States District Judge

Order filed May 9, 1997.